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SUPREME COURT, U.S.

No. 07-573

In the Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

VOLVO CARS OF NORTH AMERICA, LLC,

Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1.

Below, the Illinois Appellate Court reversed a judgment in a breach of warranty action, without oral argument, finding that the plaintiff-petitioner failed to prove damages, an essential element of his *prima facie* case. Without directly saying so, plaintiff here contends that the appellate court's application of Illinois Supreme Court Rule 352 – which authorizes a reviewing court to dispose of a case without oral argument where it finds "no substantial issue" – violated his Fourteenth Amendment right to procedural due process. Plaintiff did not present, and the courts below did not pass on the constitutional argument raised here. Did the plaintiff adequately preserve his constitutional claim for review by this Court?

2.

Independent sources, such as state law, create and define what constitutes a "property interest;" the Constitution does not. Illinois law does not recognize a property interest in a judgment subject to appellate review. Did the trial court's money judgment in plaintiff's favor create a property interest entitled to protection under the Fourteenth Amendment's Due Process Clause?

Corporate Disclosure Statement

Defendant-respondent Volvo Cars of North America, LLC, a Delaware limited liability company, has one member, Ford Motor Company, a publicly traded company.

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Rule Involved

Illinois Supreme Court Rule 352(a) provides in relevant part:

> (a) **Request; Waiver; Dispensing With Oral Arguments.** * * *
>
> After the briefs have been filed, the court may dispose of any case without oral argument if no substantial question is presented, but this power should be exercised sparingly.
>
> * * *

(The rule's complete text is reproduced in the appendix.)

Statement of the Case

Plaintiff-petitioner Marshall Spiegel ("Spiegel" or "plaintiff") filed a breach of warranty complaint against Defendant-respondent Volvo Cars of North America, LLC ("Volvo") in Illinois state court alleging claims under the Magnuson-Moss–Federal Trade Commission Warranty Improvement Act ("the Act"), 15 U.S.C. § 2301, *et seq.*, for breach of written and implied warranty and revocation of acceptance arising out of his purchase of a Volvo automobile. (App. 1.)

At trial the jury found for plaintiff on his implied warranty claim and awarded damages totaling $10,680.00, consisting of $7,300 for diminished value, and incidental and consequential damages of $680 for loss of use, and $2,700 for aggravation and inconvenience. (App. 41.) The trial court entered judgment on the verdict.[1] It later amended the judgment to include an award for attorney's fees and costs under § 110(d) the Act, 15 U.S.C. § 2310(d), in the amount of $31,479.30. (*lbid.*) The trial judge denied Volvo's motion for judgment notwithstanding the verdict on the implied warranty claim, which if granted would have required that the fee and cost award be vacated. (*lbid.*) Volvo appealed and posted an appeal bond to stay enforcement of the judgment. (C1132-35; C1155.)

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[1] The jury found for Volvo on the written warranty claim and the trial court subsequently found for Volvo on the revocation of acceptance claim. (App. 41.) Plaintiff did not appeal either of these findings.

The Illinois Appellate Court reversed. And contrary to the representations made in the Petition, it did so "on the basis that Spiegel failed to prove damages and thus failed to prove a prima facie claim of breach of implied warranty of merchantability." (App. 44.)[2]

Spiegel filed a petition requesting the appellate court to rehear the case, claiming, *inter alia*, that it improperly invoked Illinois Supreme Court Rule 352. (App. 3-12.) The rule allows a case to be decided without oral argument where the court finds "no substantial issue." (App. 1.) Spiegel claimed that the case involved substantial issues. He also included an assertion that oral argument was "constitutionally required as a matter of due process." (App. 10.) But as the passage set out below amply demonstrates, Spiegel did not support his "constitutional" contention with substantive argument or analysis, citation to authority, or identify whether he sought redress under the Federal or Illinois Constitution:

> "[Illinois] Supreme Court Rule 352 cautions that cases should be taken without oral argument "sparingly." Plaintiff believes that the issues presented in this case are "substantial" and that oral argument is appropriate and constitutionally required. This Court's order has deprived Plaintiff of a jury verdict and his counsel has been deprived of compensation for hundreds of hours of work. Taking a case

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[2] The Petition inaccurately claims that the appellate court reversed "on the basis that the diminished value evidence was admitted without proper foundation." (Pet. at 2.)

> without oral argument and reversing is qualitatively different than taking a case without oral argument and affirming, especially when the reversal entails taking away a jury verdict in which there exists a constitutionally-protected property interest. Plaintiff believes that in a case such as this oral argument is constitutionally required as a matter of due process.

(App. 10.) After the appellate court denied his request for rehearing, Spiegel petitioned the Illinois Supreme Court for leave to appeal. (App. 13-45.) In this petition Spiegel reiterated his assertion that the constitution required the appellate court to conduct oral argument but again presented no substantive argument or analysis and cited no authority. (App. 30-31.) Instead, Spiegel merely repeated the paragraph excerpted above. (*Ibid.*) The Illinois Supreme Court denied Spiegel's petition. (Pet. at 11a.)

Reasons For Denying The Petition

1. Plaintiff Did Not Present His Fourteenth Amendment Due Process Claim To The Illinois Courts And Thus Did Not Preserve The Claim For Review By This Court.

The Supreme Court should not exercise its appellate jurisdiction in a case where a federal question was "not pressed or passed upon" in the lower courts. *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983). Because Spiegel did not present a federal claim to the Illinois courts the Petition should be denied. 28 U.S.C. § 1257. *See, e.g., Howell v. Mississippi*, 543 U.S. 440, 446

(2005); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969).

Plaintiff did not urge the courts below to find that the Fourteenth Amendment's Due Process Clause requires oral argument in this or any other case. (*See* App. 10; App. 30- 31.). Indeed, he did not even cite the Fourteenth Amendment or its Due Process Clause in either his Petition for Rehearing or his Petition for Leave to Appeal. (App. 10; App. 30- 31.).[3] A vague appeal to constitutional principles does not preserve an issue for review. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). Spiegel's generalized invocation of "due process" and "constitutional" concerns do not amount to presenting a federal question to the Illinois courts. *Howell*, 543 U.S. at 442, n.2 (collecting cases). A party cannot generally invoke the Constitution and wait until proceeding before the Supreme Court of the United States to specify the constitutional provision at issue. *Id.* This is particularly important where, as here, a state statute or rule is challenged and the state courts have not been given an opportunity to interpret the rule or statute. *Gates*, 462 U.S. at 218-19 (*quoting McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940)).

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[3] Rather, Spiegel argued that the Illinois Appellate Court improperly applied Illinois Supreme Court Rule 352 by issuing its ruling without entertaining oral argument in a case involving "substantial issues."(App. 10; App. 30- 31.).

And because Spiegel did not properly present the due process question he now raises to the lower courts, an inadequate record exists to enable this Court to address the issue. *Cardinale*, 394 U.S. at 439 (finding that the record is likely to be inadequate to determine issues not presented to the lower courts).

Finally, Spiegel's filings below do not make clear that he raised *federal* constitutional issues before the Illinois courts. "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981) (emphasis original). The Illinois Constitution contains its own Due Process Clause. Ill. Const. art. 1 § 2. So even if Spiegel properly raised a constitutional challenge in his state court briefs, the courts below may have interpreted it to be a challenge under the Illinois Constitution. *Bankers Life & Cas. Co.*, 486 U.S. at 78.

Because Spiegel failed to properly raise his federal due process claim in the Illinois courts, he failed to preserve it for consideration by this Court and his Petition should be denied.

2. Plaintiff Cannot Meet The Threshold Requirement Of Demonstrating A "Property Interest" Entitled To Due Process Protection.

In addition to his failure to properly raise and preserve his federal due process claim below, plaintiff

faces a second insurmountable hurdle; he cannot satisfy the threshold requirement of demonstrating a protected property interest.

Procedural due process requirements apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). Spiegel does not claim deprivation of a liberty interest. Instead, he contends that the Illinois Appellate Court deprived him of property, specifically "[a] judgment entered on a jury verdict." (Pet. at 3.) However, plaintiff presents absolutely no case law authority to support his contention. Nor does he offer any effective rebuttal to the well-established due process and related state law jurisprudence that negates the unqualified equation of a jury verdict and resulting judgment that is being reviewed by a state appellate court with a due process "property interest." Consequently, despite his request to this Court to consider whether the Fourteenth Amendment's Due Process Clause requires a state appellate court to provide a plaintiff-appellee an opportunity to present oral argument before the court reverses a lower court's award of money damages, the plaintiff in this case cannot, for purposes of his own claim, meet the threshold requirement of demonstrating a "property interest" entitled to due process protection. For that additional reason, his Petition should be denied.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. *Board of Regents v. Roth,* 408 U.S. at 576. The proce-

dural component of the Due Process Clause does not protect everything that might be described as a "benefit." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005), *citing Roth*, 408 U.S. at 577. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it, or a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.*

As this Court has frequently explained, such entitlements are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *Town of Castle Rock*, 545 U.S. at 756, *citing Paul v. Davis*, 424 U.S. 693, 709 (1976) (*quoting Roth*, 408 U.S. at 577).

Here, the underlying jury verdict and judgment that plaintiff characterizes as his "property interest" were entered during the course of litigation pending in an Illinois state court. The alleged due process violation occurred during the appellate phase of that very litigation. Thus, Illinois law provides the relevant legal framework for determining whether plaintiff had a "property interest" in the verdict and judgment.

Under Illinois law, a judgment that is in the process of being appealed is not a "final judgment." *In Re Marriage of Duggan*, No. 2-06-0061, 2007 WL 3051995 *4 (Ill. App. Oct. 16, 2007). A judgment becomes a vested right of property once it is no longer subject to review or modification. *Id. citing Evans v. City of Chicago*, 689 F.2d 1286, 1296 (7thCir. 1982), overruled on other grounds, 873 F.2d 1007 (7thCir. 1989). A

"vested right" is a complete and unconditional demand or exemption that may be equated with a property interest. *First of America Trust Company v. Armstead*, 171 Ill.2d 282, 664 N.E.2d 36, 40 (1996).

These principles compel the conclusion that the jury verdict and lower court judgment in the present case did not create a "property interest" since, at the time the appellate court allegedly deprived plaintiff of his "property," the verdict and judgment were still on appeal and subject to review or modification. Because the judgment had not yet become final at the point of reversal, plaintiff had not acquired any vested right tantamount to a property interest.

Illinois law also provides that the enforcement of a judgment for money only shall be stayed if a timely notice of appeal is filed and an appeal bond or other form of security is presented to, approved by, and filed with the court. Illinois Supreme Court Rule 305(c). In this case, Defendant timely filed its notice of appeal and appeal bond (C1132-35; C1155) and plaintiff's Petition does not challenge the efficacy thereof. Since plaintiff was thereby stayed from enforcing the underlying judgment, he acquired no vested right to immediate payment of that judgment, and thus no "property interest."

The rules governing procedures in Illinois' appellate courts provide no basis for asserting a vested property right to present oral argument during an appeal from a lower court money judgment. Illinois Supreme Court Rule 352(a) permits a reviewing court to dispose of any case without oral argument if no substantial question is presented. Furthermore, Illinois courts

"have long recognized that 'there can be no vested right in a particular remedy or method of procedure.'" *White v. Sunrise Healthcare Corporation*, 295 Ill.App.3d 296, 300, 692 N.E.2d 1363 (1998), *citing Chicago & Western Indiana R.R.Co. v. Guthrie*, 192 Ill. 579, 581, 61 N.E. 658 (1901). Here, after the parties had been allowed to submit, as the Petition acknowledges, "extensive and comprehensive briefs on a number of important issues" (Pet. at 4), the appellate court determined that the plaintiff had failed to establish at trial all the requisite elements of his breach-of-warranty cause of action. This was hardly a novel, unique, or substantial question. Thus, the appellate court's chosen method of deciding this particular appeal was fully consonant with Illinois' rules governing appellate procedure.[4]

Given plaintiff's failure to demonstrate an underlying substantive property interest created by Illinois law, his federal Due Process claim necessarily fails. Even if his petition could be read as showing an "underlying substantive interest under state law," his claim must nonetheless be rejected for failing to demonstrate, as a matter of federal constitutional law, that his interest rises to the level of a "legitimate

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[4] Though plaintiff also criticizes the appellate court for rendering its ruling in an unpublished order, Rules 23(b) and (e) of the Illinois Supreme Court Rules expressly sanction disposition of an appeal in this fashion. Furthermore, plaintiff's invitation to this Court to enter "the larger controversy regarding unpublished opinions generally" (Pet. at 4), is little more than a red herring, particularly when his "Questions Presented" and "Conclusion" focus exclusively on his claim of constitutional entitlement to oral argument.

claim of entitlement" protected by the Due Process Clause. *Town of Castle Rock*, 545 U.S. at 756 ("Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause") (emphasis in original), *citing Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). Here, Plaintiff is claiming an entitlement to oral argument. However, this Court has previously held that an entitlement to nothing but procedure cannot be the basis for a property interest. *Town of Castle Rock*, 545 U.S. at 764; *id.* at 770-72 (Souter, J. concurring.)

Furthermore, plaintiff's reliance upon *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478 (1988), *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (see Pet. at 3), for purposes of establishing his "property interest" is misplaced. Plaintiff is not claiming he was deprived of property by being deprived of the opportunity to bring a cause of action. The record amply negates any such notion. Instead, the cornerstone of his position is that the verdict and judgment are, in and of themselves, his "property," a proposition that none of these cases addresses or supports.

Nor does it follow, as plaintiff suggests without citation to authority, that a verdict and judgment must certainly be a property right *because* "a mere cause of action is a property right." (Pet. at 3.) If that were so, then by logical extension, every non-final ruling in every state court lawsuit would be "property"

subject to Due Process scrutiny and protection. Illinois courts, however, have chosen to include only final judgments within the sphere of vested property rights, a determination consistent with this Court's prior due process decisions such as *Town of Castle Rock*, *Paul v. Davis*, and *Board of Regents v. Roth*, discussed *supra*. Furthermore, plaintiff's Petition fails to demonstrate any significant conflict between Illinois and other states on the question of which court judgments give rise to property interests, and when and under what circumstances, does that occur.

Conclusion

For these reasons, the petition for writ of certiorari should be denied.

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